Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1451

FREDERICK B. PFISTER,

Petitioner

v.

HONORABLE NEWELL EDENFIELD
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

HONORABLE ROBERT HALL
(ASSIGNED SUCCESSOR DISTRICT JUDGE)
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

and

DELTA AIR LINES, INC., et al,

Respondents

MOTION FOR LEAVE TO FILE PETITION, AND PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

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INDEX

PAGE

OPINIONS BELOW 4
JURISDICTION 4
QUESTIONS PRESENTED 5
STATUTES INVOLVED 5
CONSTITUTIONAL PROVISIONS 6
STATEMENT OF CASE 6
A. Pre-Transfer Proceedings 6
B. Post-Transfer Proceedings (District Court Rulings) 12
C. Post-Transfer Proceedings (Court of Appeals Rulings) .. 14
D. Reassignment of Case 18
REASONS FOR GRANTING WRITS:
I. THE ISSUES HEREIN PRESENTED ARE OF EXCEPTIONAL CHARACTER AND PROFOUND NATIONAL SIGNIFICANCE WHICH DRAMATICALLY AFFECT THE WELL-BEING AND EXPECTATIONS OF MILLIONS OF PENSION PLAN BENEFICIARIES 20
Congress Specifically Intended to Redress Fiduciary Breaches in Appropriate Cases Through Compensatory and Punitive Damages and Through Creation of Federal Substantive Law 20
A. ERISA expressly provides for the full-range of legal and equitable remedies 21
B. The Fiduciary Duty Codified by ERISA 27
II. A COURT OF APPEALS CANNOT SANCTION DISTRICT COURT'S ERISA ABERRATIONS WHICH PLACE PETITIONER IN A WORSE POSITION AFTER ERISA'S ENACTMENT THAN HE WAS AT COMMON LAW BEFORE ITS ADOPTION 33
III. THE RELIEF SOUGHT HEREIN IS UNAVAILABLE IN ANY COURT, OTHER THAN THIS COURT, AND THE COURT OF APPEALS' REFUSAL TO EXERCISE ITS APPELLATE OR MANDAMUS JURISDICTION TO REVIEW THE SUBJECT ORDERS WHICH ARE FUNDAMENTAL TO FURTHER CONDUCT OF THE LAWSUIT IS IRREPARABLY INJURING THE FIDUCIARY RIGHT SOUGHT VINDICATED BY PETITIONER 36
CONCLUSION 38
CERTIFICATE OF COUNSEL 39

TABLE OF AUTHORITIES

CASES	PAGE
Adams v. Hunter, 471 F.2d 648 (4 Circ. 1973)	29
Basista v. Weir, 340 F.2d 74, 87 (3. 1965)	29
Bell v. Hood, 327 U.S. 684	30
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1970)	30, 31
Bond v. Local Union 823, International Brotherhood of Teamsters, Etc. of America, 521 F.2d 5 (1975)	28
Dickinson v. Petroleum Conversion Corp. 338 U.S. 507	37
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	28
Gill v. Manuel, 488 F.2d 799, 801 (9. 1973)	30
Gillespie v. U.S. Steel Corp. 329 U.S. 148 (1964)	36
Griffin v. International & United Auto., et al., 469 F.2d 181, (1972)	28
Harrison v. United Transportation Union, 530 F.2d 558 (1975) cert.den., 425 U.S. 958 (1976)	28, 29, 30
International Brotherhood of Electrical Workers v. Foust No. 78-38 (1979)	28
International Union, et al v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966)	27
J. I. Case Co. v. Borak, 377 U.S. 426 (1964)	31
Land v. Pollar 330 U.S. 731	36
Minnis v. International Union United Auto., Aerospace, Etc., 531 F.2d 850, 852 (1975)	28
Mutual of Omaha v. Egan No. 79-1073 (March 1980)	34
Northwestern National Casualty Co. v. McNulty, 307 F.2d 432, (5 Circ. 1962)	29
St. Clair v. Local No. 515, 422 F.2d 128, (6 Circ. 1969)	29
Steele v. Louisville & N. R. Company, 323 U.S. 192, 65 S.Ct. 226 (1944)	28
United States v. General Motors Corp. 323 U.S. 373	36
Vaca v. Sipes, 386 U.S. 171 (1966)	28

STATUTES	PAGE
28 U.S.C. Section 144	P-1
28 U.S.C. Section 455	P-1, P-2, P-3
28 U.S.C. Section 1651	4
29 U.S.C. Section 185	32
29 U.S.C. Section 1001	5, 6, 23
29 U.S.C. Section 1024	6
29 U.S.C. Section 1031	6
29 U.S.C. Section 1104	6, 7, 11, 12, 13, 16, 34
29 U.S.C. Section 1105	6, 7, 12, 13, 16
29 U.S.C. Section 1106	6, 7, 12, 13, 16
29 U.S.C. Section 1109	6
29 U.S.C. Section 1131	6
29 U.S.C. Section 1132	6, 12
29 U.S.C. Section 1133	6, 10
29 U.S.C. Section 1136	6
29 U.S.C. Section 1140	6, 11, 16
29 U.S.C. Section 1141	6, 11, 16
29 U.S.C. Section 1144	6, 12, 13

MISCELLANEOUS

Am. Jur. New Topic Service: Pension Reform Act 32
Honorable Justice Learned Hand "Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law can save it." 35
H. R. Conf. Rep. No. 93-1280, 93rd Cong., 2nd Sess. in 1974, U.S. Code Cong. & Ad. News pp. 5038, 5107 27
Legislative History of Employee Retirement Income Security Act of 1974, Vol. III, P. 4871 24
Senate Report No. 127, 93rd Cong., 1st Sess. U.S. Code of Cong. & Ad. News 4855; *H. R. Rep. 807,* 93rd Cong., 2nd Sess., U.S. Code Cong. & Ad. News 4689 26
Senate Report No. 383, 93rd Cong. 1st Sess. U.S. Code, Cong. & Ad. News 4904 25
Webster, Fiduciary Responsibility: Questions and Answers", 31 *The Business Lawyer* 129, 130 (October 1974) 24
Williams, "Prudent Man Rule of the Pension Reform Act of 1974. 31 *The Business Lawyer* 105. (October 1975) 20

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MOTION FOR LEAVE TO FILE PETITION, FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

Frederick B. Pfister, petitioner herein, by his undersigned attorney, moves this Court as follows:

1. For leave immediate, to file the petition for common law writ of certiorari and/or writ of mandamus and/or prohibition, and/or injunction annexed herewith.

2. After granting leave, to issue a common law writ of certiorari and/or writ of mandamus and/or prohibition and/or injunction, directed to Respondents Honorable Newell Edenfield, and Robert Hall (assigned successor district judge) and to the United States Court of Appeals for the Fifth Circuit in accordance with the prayer of petitioner; and affording petitioner such other and further relief herein as this Court determines just and proper.

DATED March 15, 1980

Respectfully submitted,

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PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

Frederick Pfister, Petitioner herein, prays that common law writs of certiorari issue to review the orders of the District Court filed on December 21, 1978 (Appendix A) and July 2, 1979 (Appendix E) dismissing Petitioner's complaint for compensatory and punitive damages for breach of fiduciary duties; to review orders of the Court of Appeals for the Fifth Circuit filed on July 3, November 5, November 13, and December 5, 1979, (Appendix F, I, J, K), respectively. Petitioner further prays that writs of mandamus and/or prohibition and/or injunction issue to the District Court and Court of Appeals, Respondents herein, restraining said respondents from enforcing said orders and commanding that Respondents vacate said orders expeditiously and for cause Petitioner shows as follows:

OPINIONS BELOW

The orders and opinions of the District Court and Court of Appeals, the subject of the within motion, are unreported at this time. The orders of the District Court, Respondent Edenfield, appear at Appendix A and Appendix E of the Separate Appendix. The orders of Respondent Court of Appeals appear at Appendix F, Appendix I, Appendix J, Appendix K, respectively of the Separate Appendix.

JURISDICTION

Jurisdiction to grant the common law writ of certiorari and the writs of mandamus and/or prohibition and/or injunction to prevent enforcement of the orders entered by Respondent, District Court, and Respondent Court of Appeals, is conferred on this Court by provision of Section 1651(a) Title 28, United States Code, and Rule 30 of the Rules of this Court. The mandate of the Court of Appeals respecting the subject orders was issued on December 18, 1979 as more fully appears in Appendix L of the Separate Appendix.

QUESTIONS PRESENTED

1. Whether a District Court having flaunted Congressional intention and a federal statute's commands to create a federal fiduciary standard of care fashioned from federal substantive law, thereby leaving Petitioner remedieless for injury committed by fiduciary misconduct; and having eliminated as a matter of law compensatory and punitive damage redress for the injury occasioned by fiduciary misconduct; and having further misstated the character of petitioner's law suit, which derives solely from breaches of fiduciary and tort duties owed petitioner; and where such District Court acted to obscure appellate consideration, is answerable by writs of mandamus or prohibition or injunction in this Court.

2. Whether a Court of Appeals, balking its jurisdiction, to cure and correct serious irregularities and impermissible anomalies in the District Court orders, and which makes further rulings that profoundly impede and impair petitioner's, not yet litigated ERISA substantive rights, is held answerable in this Court by prescriptive writ of mandamus, prohibition or injunction.

3. Whether this Court, under its prerogative power to grant a writ of common law certiorari should act now to completely review the subject orders of the District Court, and Court of Appeals, where said orders are fundamental to further conduct of the litigation, and will irreparably destroy, if not cured herein, the very fiduciary protections sought vindicated by the petitioner in his litigation, where both the District Court and the Court of Appeals making said orders are with taint.

STATUTES INVOLVED

This case involves first impression interpretation of the fiduciary and various other provisions of the Employee Income Security Act of 1974, 29 U.S.C. § 1001 et. seq., hereinafter ERISA. Specific statutory provisions are cited herein, and set forth in their complete text in the Separate Appendix at Appendix P.

They are as follows: 29 U.S.C. § 1001, 29 U.S.C. § 1024; 29 U.S.C.§ 1031; 29 U.S.C. § 1104; 29 U.S.C. § 1105; 29 U.S.C. § 1106; 29 U.S.C. § 1109; 29 U.S.C. § 1131; 29 U.S.C. § 1132; 29 U.S.C. § 1133; 29 U.S.C. § 1136; 29 U.S.C. § 1140; 29 U.S.C. § 1141; 29 U.S.C. § 1144.

CONSTITUTIONAL PROVISIONS

THIS CASE ALSO INVOLVES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION SET OUT COMPLETELY IN APPENDIX Q, BUT WHOSE PERTINENT PROVISIONS PROVIDE:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

STATEMENT OF CASE

A. Pre-Transfer Proceedings

Petitioner PFISTER commenced suit on October 26, 1976 pursuant to Section 29 U.S.C. Section 1132, (Appendix P) of the Employee Retirement Income Security Act of 1974, hereinafter ERISA, for Retirement Income Security Act of 1974, hereinafter ERISA, for damages occasioned by the Respondents, and each of them, for substantial violations and breaches of the fiduciary duties under ERISA, 29 U.S.C. Section 1104, 1105, 1106, (Appendix P) as well as for torts committed by the Respondents recognized at common law as fraud, misrepresentation and deceit; intentional and negligent infliction of emotional distress and mental harm; breach of the implied duty of good faith and fair dealing; tortious interference with a fiduciary relationship; and injunctive relief seeking to enjoin the Respondents from committing further characteristic violations of his rights, and to deter further discrimination preventing the Petitioner and others like him, from enjoyment of Plan benefits.

Respondent DELTA FAMILY CARE PLAN, hereinafter "Plan" is a generic reference embracing the Delta Disability and Survivorship Plan (Disability Benefits) and the Delta Family Care Retirement Plan (Pension Benefits), and is an employer-dominated Plan entity designed, administered, supervised, and enforced by DELTA AIR LINES, INC., hereinafter "Delta" and, specifically, by senior executives of Delta. The Plan confers substantial tax benefits in the form of tax deductions to the Defendant DELTA, who in 1975 paid no corporate income taxes; and in 1976, virtually none. The PLAN is operated and discharged free from the surveillance of the insurance regulatory commission and is otherwise not subject to scrutiny or watch by collective bargaining (DELTA is a non-union employer which self funds its employee benefits).

Respondent PLAN is an employer-motivated instrument which distributes as much, if not more, economic consideration upon the Defendant DELTA than it does upon Petitioner, whose exclusive best interests according to ERISA is the interest that is to be statutorily served by the Plan. In fact, the PLAN is an alter-ego of Respondent DELTA and impacts directly upon the Petitioner, and other Plan beneficiaries, with no interposing third party presence.

Petitioner states Respondents have intentionally and knowingly carried forward a program of fraud and oppression, designed and maliciously intended to disenfranchise PFISTER from "protection" owing to him under the PLAN. PFISTER acknowledges that in order to be eligible for protection under the PLAN he must be either an employee of DELTA or permanently, totally disabled. The gravamen of the PFISTER charge is that the Defendants in conspiracy one with another in violation of their federal fiduciary duties to act exclusively in the Petitioner's best interest and in a manner characteristic of a reasonable prudent man, and in good faith, 29 U.S.C. § 1104, 1105, 1106, have malevolently denied him entitlement and access to either status necessary for his enjoyment of benefits

under the PLAN. The fact that PFISTER is permanently, totally disabled compounds the gravity of the Respondents' fiduciary misconduct.

PFISTER relying upon the representations made to him by Respondents that he need not worry about protecting against sickness, injury, retirement security, etc. because Respondents would guarantee these protections to him under the provisions of the PLAN, alleges injury by electing against his prior employer's benefit plan and refraining from seeking any independent coverages to protect for the catastrophic circumstances that now beset him—having relied upon the fiduciary duties of DELTA and PLAN to act in his best interest and ensure his well-being.

PFISTER alleges that Respondents recognized his total and permanent disability; and that while his overall physical condition had steadily deteriorated, the PLAN acting through the Respondent STEPHENS, not identifying himself to the Petitioner as an executive of the Plan—but, DELTA instead—summarily rescinded his total and permanent disability status. Further, PFISTER alleges that all his ancillary coverages as defined under the DELTA FAMILY CARE PLAN—including group, life, health, hospital and other coverages—were also brusquely, without explanation, unilaterally cancelled. (Appendix S)

Due to the seriousness of industrial injuries which rendered Pfister totally disabled from any occupation in November 1974, one physician recommended a spinal fusion. And from March 1974 through August 1975, Pfister was prescribed medication—including such narcotics as percodan, butazolidin, decadron, sterozolidan, indocin—to reduce swelling and inflammation and to alleviate pain associated with his injuries. In August 1975, a few short months after Petitioner's benefits and protections under the PLAN were summarily cancelled by Delta's March 5, 1975 letter, (Appendix S) the ravages of drug therapy having produced serious adverse reactions in the

Petitioner since September 1974 and dramatically in March 1975, as confirmed by medical records of the treating physicians, Pfister was hospitalized in emergency surgery. In August 1975 an exploratory laparotomy revealed Pfister suffered from an acute perforated appendix further complicated with serious intra-abdominal abscessing. After a substantial hospital stay, Respondents summarily refused payment of Petitioner's hospital costs and bill citing their March 5 letter.

Petitioner made several demands upon the PLAN and other DELTA executives participating in the summary and brusque cancellation of his disability, hospital, insurance and pension benefits for guidance concerning the proper presentation of his grievance and the improper termination of his PLAN benefits—aforesaid requests and demands rebuffed by Respondents. Pfister's demands and requests for PLAN documents, procedures, policies, and the like which would enable him to process his grievance were also ignored in conscious disregard of Respondents' fiduciary duties. Moreover, the Respondents at no point appraised the Petitioner of his conversion opportunities with respect to the cancellation of his PLAN benefits; and, in fact, said benefits were cancelled March 1, 1975—the same day Petitioner's disability status was rescinded, in total derogation of the PLAN's own specifications respecting conversion opportunities available to beneficiaries of the PLAN.

Petition has further claimed the Respondents DELTA acting on the behalf of the PLAN not only failed to provide him with the documents demanded, required under ERISA and ERISA's predecessor, the Welfare Pension Plan Disclosure Act, but also that the subject documents were not on file at the United States Department of Labor from August 1973 up and through September 1976. Further, no Respondent Fiduciary communicated with the Petitioner or provided him assistance and information necessary for the preservation and exercise of his ERISA or plan rights.

After **Petitioner was certified in November 1974 as totally disabled from any occupation by his treating physician,** Respondents DELTA and ADUDDELL, as well as others sought to force the Petitioner to resign and thereby forfeit all his PLAN protections voluntarily, which Respondents later terminated involuntarily.

Petitioner states that false representations were made for the purpose of influencing him to meet with representatives of Respondent BREWER ADJUSTMENT COMPANY (hereinafter BREWER) and its key employee Charles Bishop. Said Respondents BREWER and BISHOP, though represented as independent contractors, were under the control of Respondent DELTA and served the exclusive interests of Respondent DELTA at detriment to Petitioner, a PLAN beneficiary, in violation of the PLAN's fiduciary duty to act exclusively in the best interests of Petitioner. Respondent BREWER and BISHOP were not retained, hired, and paid by the Respondent PLAN, but by the Respondent DELTA—DELTA having usurped a PLAN function belonging properly to the PLAN and in total derogation of Petitioner's rights to have BREWER and BISHOP act as the agent for the fiduciary PLAN in a manner comporting with Petitioner's exclusive best interest, not DELTA's.

The administrative due process provisions—29 U.S.C. § 1133 (Appendix P,) built into the ERISA statute require, at minimum, that the Petitioner be provided with the following information by the PLAN Fiduciary participating in the denial of his claim for benefits:

1. The specific reasons for denial;
2. Specific references to pertinent plan provisions;
3. A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and,

4. Information concerning the procedure the claimant must follow to obtain review of the denial.

Further, the PLAN must furnish an opportunity for a full and fair review of the claim, and Petitioner must be allowed to inspect all PLAN Documents and other papers with respect to his claim. An opportunity to submit issues and comments in writing is also required. All these protections must be afforded within a reasonable period of time. Petitioner charges Respondent flaunted these procedures.

Further, Respondents are charged with engaging in a pattern of conduct designed to interfere with the attainment of various ERISA and Plan rights proscribed by 29 U.S.C. § 1140 and 29 U.S.C. § 1141 and aforestated conduct also violates the fiduciary provisions of 29 U.S.C. § 1104, *et. seq.* On these facts Petitioner initiated this action.

Respondent DELTA moved this action be transferred pursuant to 28 U.S.C. § 1404(a) in December of 1976, and on March 31, 1977, the late Judge Joseph Waddy of the District Court for the District of Columbia granted DELTA motion and ordered the case transferred to United States District Court for the Northern District of Georgia, Atlanta Division.

After vigorous challenge without avail, to the United States Court of Appeals for the District of Columbia, both through mandamus and attempted appeal, averring that such a transfer offended the fiduciary provisions of ERISA and that the Atlanta forum was so pervasively dominated by Respondent DELTA, a fair judicial proceeding was impossible, Petitioner Pfister brought his cause by writ of certiorari to this Court in January of 1978 (No. 77-1078).

Relying before this Court upon Senior Circuit Judge Fahy's opinion of October 31, 1977 (Appendix T) that the District Court had abused his discretion in ordering the transfer, Pfister beseeched that he not be dispensed to the

Atlanta forum, as it would seriously endanger his ability to carry forward there the litigation. This Court was unmoved and the Petitioner was given his judicial ticket to the District Court for the Northern District of Georgia in Atlanta. In the summer of 1978, this action was assigned, to Respondent Newell Edenfield.

B. Post-transfer Proceedings (District Court Rulings)

The matter came before Respondent Edenfield in September of 1978, on Respondent Delta's motion to dismiss.

Respondents contended in their moving papers as follows. Notwithstanding how outrageous, malicious, vexatious, or heinous Respondent fiduciary misconduct is, it makes no difference under ERISA, since the statute does not authorize nor permit compensatory or punitive damages as a matter of law. Respondents further state the ERISA statute is the exclusive vehicle available to Petitioner and other PLAN beneficiaries to redress his injuries and since it is a remedial statute, a jury trial does not attach, and Petitioner claims for relief must be redressed through conventional equitable remedies not damages. Respondents further argued that ERISA's broad preemption provisions, 29 U.S.C. § 1144 (Appendix P) displaces all state laws and causes of action that otherwise would govern and control Respondents' misconduct, and that his federal fiduciary claim under ERISA did not support pendent jurisdiction over state causes of action. Presumably, Respondent Edenfield regards preemption sufficiently broad to preempt any common law causes of action based on the breech of Federal fiduciary duties.

The District Court Respondent Newell Edenfield ruled upon Respondent's motion to dismiss without providing the strongly urged oral argument requested by petitioner, and on December 21, 1978 rendered the subject order. (APPENDIX A). Respondent Edenfield held that ERISA's general remedial scheme does not support a claim for damages and that the language of 29 U.S.C. § 1132 and the statute's legislative

history evidence a clear intent to preclude damages of this sort. (APPENDIX A). Respondent Edenfield further disregarded petitioner's plea that punitive damages are essential to deter breaches of fiduciary duty and guarantee proper management of the Plans.

The District Court balked at its responsibility to fashion a rule of federal fiduciary care, crafted from substantive federal labor law, and effectively left the petitioner remediless for the wilfull and intentional breaches of fiduciary duties embodied under 29 U.S.C. § 1104, 29 U.S.C. § 1105 and 29 U.S.C. § 1106 owed to him by Respondent DELTA. The Respondent Court held Petitioner's additional tort claims for damages at common law in abeyance, pending further consideration.

The Petitioners claim for injunctive relief with respect to other plan participants was also dismissed by Respondent Edenfield. In summary petitioner's counts (II, III, IV) for damages, compensatory as well as punitive, growing from Respondent Delta's alleged wilfull and egregious breach of the fiduciary provisions 29 U.S.C. § 1104, 29 U.S.C. § 1105, and 29 U.S.C. § 1106 were dismissed.

On July 2, 1979, Respondent Edenfield, with petitioner common law counts for tort injury under submission since Feb. of 1979, dismissed (Appendix E,) petitioner's claim for intentional and negligent infliction of emotional distress (Count V), fraud, misrepresentation and deceit (Count VI) tortious interference with a fiduciary relationship (Count VII) and breach of the fiduciary duty to deal in good faith (Count VIII) (Appendix E) on the perception that these claims are ostensibly within the contemplation of the pre-emptive clause of ERISA, 29 U.S.C. § 1144. And if even petitioner could state a cognizable nonpreempted claim, Respondent Edenfield would not exercise his pendent jurisdiction over it, notwithstanding it followed as a consequence of injury to a federal right.

The practical effect of Respondent Edenfield's Dec. 21, 1978 order dismissing all claims for compensatory and punitive damages occasioned by Respondents' Delta willful violation of its fiduciary duties in combination with his refusal to exercise jurisdiction over the common law tort counts, judicially bludgeoned Pfister's prayer. Petitioner, was placed in an inferior legal position by Respondent Edenfield as a direct result of a statute, ERISA, designed to improve and foster beneficiary right and protect his benefit expectations.

On or about August 2, 1979, petitioner filed a motion pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455, on the basis that respondent Edenfield was disqualified from acting and proceeding further in the subject litigation, on account of extra-judicial factors derived outside of the litigation, and stemming in part from Respondent Edenfield's association, with Stuart Eizenstat, Chief Administration Adviser, exercising control over the United States Department of Labor, entrusted with enforcement and interpretative duties under ERISA.

Petitioner further stated that Mr. Eizenstat, in addition to having been Respondent Edenfield's Senior Law Clerk from 1968-1970 was also an associate partner in Respondent Delta's law firm of Powell, Goldstein, Frazer, Murphy of Atlanta, Georgia.

C. Post-Transfer Proceedings (Court of Appeal Rulings)

Petitioner filed separate notices of appeal from the final orders of the District Court, the subject of this petition. On July 6, 1979 the Respondent Court of Appeals (Appendix F) dismissed Petitioner appeal from the District Court's December 21, 1978 order without opinion.

On August 6, 1979, the Court of Appeals (Appendix G) recalled its mandate dismissing Petitioner's Appeal from Respondent Edenfield's December 21, 1978 order, allowing Petitioner 20 days' time within which to file a petition for rehearing of said dismissal (no. 79-1763).

Petitioner also processed his notice of appeal from Respondent Edenfield's order of July 2, 1979 dismissing all claims for damages accruing from Respondent DELTA's common law torts, where compensatory and punitive damages would attach. This later appeal No. 79-3207 was also dismissed by Respondent Court of Appeals by its order of November 5, 1979, (Appendix "I") also without opinion. A panel of Respondent Court of Appeals consisting of Circuit Judges Gee, Hatchett, and Henderson (formerly Chief Judge of United States District Court for Northern Division of Georgia, Atlanta Division, recently appointed Circuit Judge) issued said order.

Prior to Respondent Court of Appeals' dismissal of appeal No. 79-3207, Petitioner moved aforesaid Circuit Court for an order consolidating causes Nos. 79-1763 and 79-3207 because the appeals arose from common transactions, occurrences and like and had a common nucleus. Further, said orders, of December 21, 1978 and July 2, 1979, the subject of the respective appeals, when viewed in combination presented legal questions of substantial proportion which are *fundamental to the further conduct of the suit at bar and when considered collectively effectively conclude the litigation, and unresolved, cloud the litigation as they now do. Said motion to consolidate causes was denied summarily.*

Said motion to consolidate was summarily denied by Respondent Court of Appeals (Appendix I).

Respondent DELTA in response to PFISTER attempted appeal No. 79-3207 filed a motion to dismiss and a motion to hold Petitioner's counsel personally responsible for costs, on the novel theory that by seeking appellate review of patently false orders of Respondent Edenfield, Petitioner was committing a grievous transgression of procedure.

Petitioner's counsel filed a cross motion with the Respondent Circuit Court indicating that DELTA's motion for costs was spurious, and a ruse further designed and calculated to oppress the Petitioner, his counsel, a single practitioner, from prosecuting Petitioner's cause for redress against Respondent's spectacular show of fiduciary malfeasance; and in itself constitutes a violation of 29 U.S.C. § 1140, and 29 U.S.C. § 1141.

Although Petitioner also filed motions with the Court of Appeals prior to November 5, 1979 when said Court dismissed his appeal No. 79-3207 (Appendix I) Respondent Court of Appeals did not act upon said motions until November 13, 1979.

Petitioner moved to file an amended complaint and pleading in the Court of Appeals because of the disqualification of Respondent Edenfield moved on August 2, 1979. Said amendment sought relief restoring twenty-five (25) million dollars of Plan monies emaciated from the Respondent Plan, and otherwise lost by the imprudent and unreasonable decisions of Respondent DELTA in the management of the funds of said Plan, in derogation of their fiduciary duties under 29 U.S.C. § 1104, 29 U.S.C. § 1105, 29 U.S.C. § 1106; as well the removal of Respondent DELTA trustees from any further management of said Plan assets, together with the appointment of a successor trustee for the Respondent Plan appointed by the Respondent Court of Appeals to prevent further imprudent conduct; and an audit of said Plan carried out by the U.S. Department of Labor and Internal Revenue Service. Said amendment was summarily denied (Appendix J.)

Petitioner further sought to disqualify both legal counsel for Respondent DELTA—Vedder, Price, Kaufman, Kamholz & Day; and Powell, Goldstein, Frazer, & Murphy. The former firm's disqualification was sought for its vigorous lobby activities on behalf of the largest anti-ERISA institutional faction in Washington, e.g. ERIC, and because its senior partner, representing Respondent DELTA herein, was formerly General

Counsel for the National Labor Relations Board and Solicitor of Labor, raising further *propriety* question, because of the Labor Department's responsibilities in ERISA litigation of this type to assist in implementing the fiduciary provisions of the statute.

The latter law firm's disqualification was sought because its associate, David Garrett, III is the son of Respondent David Garrett, Jr., President of Respondent DELTA. Further said law firm represents both Respondent Garrett and Respondent Plan, whose interests are asymmetrical and adverse in this litigation. For instance, if Respondent DELTA were ordered to pay back $25 million of Plan losses to Respondent Plan, this would be a plus for Respondent Plan, but unacceptable to Respondent DELTA. Such dual representation violates the Canons of Ethics, that a single legal counsel cannot serve two competing interests. This motion was also summarily denied by Respondent Court of Appeals on November 13, 1979, (Appendix J.)

Petitioner further moved in early November 1979 for a stay of all further proceedings in both Respondent courts until Respondent Edenfield acted upon his disqualification and recusal lodged on August 2, 1979. This motion for stay was also denied summarily. (Appendix J.)

Said Respondent Court consisting of Judges Henderson, Gee, Hatchett, further ordered sua sponte that appellant opposition to Respondent DELTA motion to impose cost upon legal counsel and its petition for rehearing are stricken on the basis of impertinent and disrespectful references to Respondent Edenfield and Respondent DELTA and their legal counsel.

Petitioner filed a motion to have the Court of Appeals recuse itself and vacate its orders of November 5, 1979 and November 13, 1979, because of debilitating conflicts of interest between Respondent Henderson, Circuit Judge, and Respondent Edenfield, District Judge.

Aforesaid Circuit Judge Henderson was at the time of the subject litigation Chief Judge of the United States District Court for Northern District of Georgia, Atlanta Division, where the action is being prosecuted. Further, Respondent Henderson has close personal ties and alliances with both Respondent DELTA and Respondent Edenfield as would substantially color his judgment and preclude the impartiality which Petitioner expects and is entitled to receive from an appellate tribunal. It may well be that with the 26 individual DELTA executives-fiduciaries named, Respondent Henderson may have a statutory basis of disqualification as well. Said motion to recuse Respondent Court of Appeals was also summarily denied as was a petition for rehearing lodged with Chief Judge Brown of the Fifth Circuit. (Appendix K.) In compliance with the Respondent Court's order of December 5, 1979 Petitioner's counsel, a single practitioner, became duly certified to practice before the United States Court of Appeals for the Fifth Circuit.

D. Reassignment of Case

On December 18, 1979, Petitioner was notified by letter that both subject appeals No. 79-1763 and 79-3207 were dismissed and that the mandate, which was previously recalled, was reissued on December 18, 1979 (Appendix L.) On or about December 22, 1979 Petitioner received a notice dated December 21, 1979 from the District Court Clerk indicating the subject litigation was mysteriously reassigned by some unexplained force to Respondent Robert Hall. (Appendix M.) Simultaneous with aforesaid order of reassignment, Petitioner was advised that an order was filed December 19, 1979 by Respondent Edenfield denying Petitioner's motion for disqualification of Respondent Edenfield as moot since the case was transferred to Judge Hall. (Appendix N.) Petitioner has never received any response on the merits to his disqualification of Respondent Edenfield moved over 8 months previous.

Petitioner believes that Respondent Edenfield owes it not only to Petitioner but to himself to respond to Petitioner and the Court on the charges made by Petitioner in good faith to ensure fairness and impartiality in the conduct of Petitioner's trial.

Furthermore, while Respondent Edenfield has furtively withdrawn from proceeding any further herein, his orders of December 21, 1979 and July 2, 1979 remain prominently at the forefront of this litigation.

Petitioner asked that the Clerk of the Court of Appeals prepare and certify and index a copy of these proceedings (Appendix O) which was done on about January 18, 1980 in anticipation of these writs being filed. Said certified record is now in the possession of the Clerk of this Court consistent with Rule 31(2) of this Court.

Petitioner has filed a notice of appeal from Respondent Edenfield's denial of disqualification, and this Court may exercise its powers under Rule 20, as soon as this matter is docketed with the Respondent Court of Appeals should it choose to do so. Petitioner further advises that from August 2, 1979 thru December 19, 1979 Respondent District Court was infected with bias precluding action there, without risk and likelihood of waiver of disqualification or rehabilitation of Respondent Edenfield.

REASON FOR GRANTING WRITS

I

THE ISSUES HEREIN PRESENTED ARE OF EXCEPTIONAL CHARACTER AND PROFOUND NATIONAL SIGNIFICANCE WHICH DRAMATICALLY AFFECT THE WELL-BEING AND EXPECTATIONS OF MILLIONS OF PENSION PLAN BENEFICIARIES.

CONGRESS SPECIFICALLY INTENDED TO REDRESS FIDUCIARY BREACHES IN APPROPRIATE CASES THROUGH COMPENSATORY AND PUNITIVE DAMAGES AND THROUGH CREATION OF FEDERAL SUBSTANTIVE LAW.

The fiduciary provisions of ERISA extend to *all duties* of the Fiduciary with respect to a Plan,[1] not just investment decisions. This is significant in the case at bar where the Petitioner has alleged an intentional and grossly reckless breach of the fiduciary provisions and due process procedures mandated under ERISA and tortious intermeddling by Respondent DELTA in the independent administration and discharge of PLAN responsibilities. Petitioners' lawsuit is one circumscribed exclusively by the law of tort.

Emerging from the Legislative History is a commonly shared purpose of protecting plan beneficiaries and the U.S. Treasuries from the reaches of self-interested plan sponsors and fiduciaries who for too long were impervious to the needs and expectations of the plan beneficiaries. The entire Act is calculated towards the creation of fiduciary standards of care and rules of conduct which are to ensure that the exclusive best interests of the plan beneficiaries are reliably served by plan fiduciaries. Congress fully intended that a plan beneficiary, like petitioner, have available his full-range of legal and equitable

[1] Williams, "Prudent Man Rule of the Pension Reform Act of 1974". 31 *The Business Lawyer* 105. (October 1975).

remedies to redress violations of his rights under ERISA —including compensatory and punitive damages, which rights are as a matter of common law available to him.

ERISA was intended to enhance and improve the protections of plan beneficiaries and to tighten the rules regulating the conduct of those who have chosen to undertake the role of plan fiduciaries. ERISA was not intended to be warped in such a way, as by Respondent Edenfield, to shield or galvanize plan fiduciaries, from conduct that in the absence of ERISA would impose liability upon them.

A. *ERISA Expressly Provides for the Full-Range of Legal and Equitable Remedies.*

The Respondent Courts' obvious imperviousness to the findings and declaration of policy that were explicitly set forth by Congress in the ERISA Statute require that it be set forth in appropriate detail at the inception of this, as it is the starting point for any meaningful interpretation any court seeks to impose upon the ERISA Statute.

It is set forth again for the Court's convenience, and will hopefully stimulate thorough consideration as it sets forth controlling parameter with respect to what federal Courts have been charged to do by the Congress:

"Findings and Declaration of Policy

SEC. 2.(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; *that the continued well-being and security of millions of employees and their dependents are directly affected by these plans;* that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they

have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; *that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered;* that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, *by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility,*

and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. 29 U.S.C. Section 1001." (emphasis added).

The Most Honorable William H. Webster, a former circuit justice, summarized best the special obligations imposed upon the judiciary and others vested with the responsibility of fulfilling the Statute when he stated:

> "I suggest you also keep in mind the statement of the Joint Committee Conference . . . *that the courts will construe these matters and interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of the employee benefit plan.*
>
> Section 404 requires that the fiduciary discharge his duties—his duties, not just his investment responsibilities—but his duties, and so we on the courts and everyone who is concerned with the enforcement of these sections, will take into account, I am sure, that special relationship, and because we must take it into account, you must likewise take it into account in making your plans.
>
> Pension plans and welfare plans are favored in the law. *They enjoy favorable tax treatment. . . .*
>
> *Because of this, I think there will be some strict looking at the rule of prudence. I am not so sure at all that we will just settle for old standards in this regard.* We will expect that fiduciaries be familiar with such matters, and I think that this, too, has a very salutary effect on the overall operation of pension and welfare plans. . . .
>
> Many of these companies are owned or controlled by small groups of interests who regard the funds that are placed in these funds as their funds and their money. In fact, in many cases, the funds were placed there as tax shelters, and not with some benevolent idea of helping employees along.

All this is going to change with the application of ERISA, it seems to me, and we will be relieved of many people in the kitchen who don't belong there."[2] (emphasis added)

Congress was well aware that in order to establish meaningful fiduciary standards under the ERISA Statute, it would be incumbent upon them to provide for mechanisms to allow vigorous enforcement of said provisions by private plan beneficiaries. If a Fiduciary could willfully violate the duties imposed upon him by the Congress without fear of rebuke other than to have to comply in the same degree and manner the law required of him initially, the fiduciary provisions would be rendered nugatory. The sentiment of the Committee to provide broad enforcement provisions is best manifest in the following statement taken directly from the Legislative History text:

> "The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries *with broad remedies for redressing or preventing violations of the Retirement Income Security for Employees Act as well as the amendments made to the Welfare and Pension Plans Disclosure Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts* and *to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law* or recovery of benefits due to participants. For actions in federal courts, nationwide service of process is provided in order to remove a possible procedural obstacle to having all proper parties before the court." (emphasis added)[3]

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[2] Webster, "Fiduciary Responsibility: Questions and Answers", 31 *The Business Lawyer* 129, 130 (October 1974).

[3] Legislative History of Employee Retirement Income Security Act of 1974, Vol. III, P. 4871.

Respondent Newell Edenfield's inability to reconcile this congressional statement of broad remedies for redressing violations and providing the full-range of legal and equitable remedies with its Order (Appendix A) that compensatory and punitive damages (traditional legal remedies) are not available can only be construed as a pernicious deficiency rendering his subject order of December 21, 1978 clearly infirmed. It is elemental jurisprudence that the "full-range of legal and equitable remedies" means precisely that. Semanticists beware!

While this language is sufficient in and of itself to include compensatory and punitive damages, Congress had the facility of language to expressly prohibit the availabilities of these remedies if it were, in fact, its intent to do so. Nowhere in the Legislative History, or in any of Respondents papers, is it shown where the Congress expressly stated fiduciary punitive or compensatory damages would not be available to redress wrong under the Statute. The more persuasive view is that the Legislative History and purposes of the Act are best achieved by the availability of this form of relief in an appropriate case, such as the instant one.

Respondent Edenfield's emphasis is inordinate with respect to the interests of employers being freed-up from additional costs resulting in discontinuation of plans. This is ruse rhetoric. Further, the Legislative History surrounding the enactment of ERISA indicates that Congress by virtue of compromise amendments in the Statute has legislated employer costs relief into the Act itself. Specifically, a number of congressional trade-offs designed to mitigate employer burdens are already enjoyed by the Respondent DELTA, and it is clear that Congress did not wish to predicate Plan improvement on relinquishing or moderating Plan protections.[4]

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[4] See *Senate Report No. 383*, 93rd Cong. 1st Sess. U.S. Code, Cong. & Ad. News 4904.

The Court's attention is directed to those portions of the Legislative History which indicate that the employer and plan sponsors were given more than adequate relief from any costs associated with ERISA by virtue of the rejection of the Bill provisions which called for immediate vesting and earlier eligibility standards.[5]

Clearly, the argument that plans are going to be discontinued if the spectre of punitive and compensatory damages exists under ERISA is hypothetical and unfounded. In the case at bar where an employer totally dominates the PLAN and exploits it for its own economic advantage, as much, if not more, than the interest of the beneficiary, and uses it as an instrument to defeat collective bargaining, I dare say that DELTA AIR LINES would cease to operate its PLAN. There is little doubt that the collective bargaining process would react most expeditiously to cover any such hiatus in employee benefits.

Moreover, the availability of compensatory and punitive damages provide no undue threat or apprehension to the plan fiduciaries who administer the main share of employee benefit plans. Indeed, no responsible plan administrator need worry as to the availability of punitive and compensatory damages, as these remedies would be available only in situations such as the one at bar where the fiduciary misconduct is so outrageous and unspeakable and so willful to prevent future abuses of a similar character, and to penalize the wrongdoers in a meaningful way from repeating that conduct.

Clearly, it was not the intent of Congress by virtue of the passage of the ERISA Statute to immunize outrageous conduct carried forth with with a total want of care by and which otherwise would subject the wrongdoer to sanctions under

[5] See *Senate Report No. 127,* 93rd Cong., 1st Sess., U.S. Code of Cong. & Ad. News 4855; *H. R. Rep. 807,* 93rd Cong., 2nd Sess., U.S. Code Cong. & Ad. News 4689.

common law to the full measure of compensatory and punitive damages. Such an interpretation would not only frustrate the purposes of the Statute, but would in large measure invalidate the entire ERISA mandate itself.

B. *The Fiduciary Duty Codified by ERISA*

The Legislative History of ERISA makes it abundantly clear that the actions arising under ERISA are to be regarded and treated in similar fashion to those brought under Section 301 of the Labor Management Relations Act of 1947. The History states as follows:

> "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947."[6]

29 U.S.C. Section 185 creates Federal substantive rights and requires development of appropriate Federal law applicable thereto. *International Union, et al. v. Hoosier Cardinal Corp.* 383 U.S. 696, 86 S.Ct. 1107 (1966).

Moreover, 29 U.S.C. Section 185 is substantive, and the laws to be applied pursuant to it are federal laws which must be fashioned from policies of our national labor laws. Congress under ERISA is telling the Court that just as the substantive law of 29 U.S.C. Section 185 should draw upon the policies of preexisting national labor laws, so too must ERISA be derived.

The doctrine of the duty of fair representation bears close functional similarity to the fiduciary Duties codified in ERISA, although the ERISA duties are statutorily stronger. It is urged that the Court weigh these duties when seeking to redress their breach. The duty of fair representation is contemplated within the purview of 29 U.S.C. Section 185, and has been duly

[6] H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2nd Sess. in 1974, U.S. Code Cong. & Ad. News, pp. 5038, 5107.

recognized by this Court commencing in *Steele v. Louisville & N. R. Company,* 323 U.S. 192, 65 S.Ct. 226 (1944). Although this tort was first propounded in the context of racial discrimination under the Railway Labor Act, the Supreme Court has extended its coverage to cases under Section 301 of the NLRA. *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953).

The aforesaid duty is tort in nature, and when breached, it will give rise to compensatory and punitive damages which "do not fall into a discretionary category, but may be recovered as of right." See *Minnis v. International Union United Auto., Aerospace, Etc.,* 531 F.2d 850, 852 (1975)

In *Bond v. Local Union 823, International Brotherhood of Teamsters, Etc. of America,* 521 F.2d. 5 (1975), the Honorable then Circuit Judge Webster stated that the duty of fair representation as codified and expounded by the Supreme Court in *Vaca v. Sipes,* 386 U.S. at 177, is a duty imposed by federal law. As the Court explained in *Griffin v. International & United Auto., et al.,* 469 F.2d. 181, 183 (1972), . . .

> "The Supreme Court did not invest the union with a carte blanche. It sought to fashion an appropriate standard by which to measure union conduct. 'The doctrine of Fair Representation includes a statutory duty to serve all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.' Citing *Vaca v. Sipes,* 386 U.S. at 177 . . . Each of these requirements represents a distinct and separate obligation, the breach of which constitutes the basis for civil action."

Up to this Court holding in *International Brotherhood of Electrical Workers v. Foust* No. 78-38 decided May 29, 1979, the prevailing view regarding the breach of the duty of fair representation could best be summarized by the holding of *Harrison v. United Transportation Union,* 530 F.2d 558 (1975), *cert. den.,* 425 U.S. 958 (1976).

The *Harrison* Court specifically rejected the Union's contention that the award of punitive damages should be stricken as not available to redress a breach of the duty of fair representation. The Court stated in appropriate language, as follows:

"'We must also reject the contention of UTU that the award of punitive damages should be stricken.

> All jurisdictions agree that the purposes of punitive damages are to vindicate the plaintiff, punish the wrongdoer, and set an example that the tortious conduct should not be repeated. . . . *Northwestern National Casualty Co. v. McNulty,* 307 F.2d 432, at 435 and 436 (5 Cir. 1962); *Adams v. Hunter,* 471 F.2d 648 (4 Cir. 1973). While compensatory damages may to some degree serve the same purposes, it is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be *de minimis. St. Clair v. Local No. 515,* 422 F.2d 128, 132 (6 Cir. 1969). *Unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation.* The situation is analogous to that present in civil rights actions where the plaintiff's rights are equally important and often equally difficult to enforce without the threat to defendants of liability for punitive damages in an aggravated case. Courts have held in civil rights suits that the "*federal common law of damages" is controlling and permits the recovery of exemplary or punitive damages, even in those cases where compensatory damages may be merely nominal. Basista v. Weir,* 340 F.2d 74, 87 (3 Cir. 1965)." (emphasis added). . . .[7]

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[7] *Harrison v. United Transp. Union,* 530 F.2d 558, 563 (1975). Cert. den. 425 U.S. 958, 96 S.Ct. 1737 (1976).

. . . The Ninth Circuit has held, however, that in a civil rights suit personal animosity is not "a prerequisite to instructing the jury as to punitive damages or to the granting of such damages." *Gill v. Manuel,* 488 F.2d 799, 801 (9 Cir. 1973). Again, analogizing the union's duty of fair representation to a constitutional duty, we hold that in the instant case proof of personal animosity or actual malice was not necessary.' "[8] (emphasis added).

When the Court reflects upon the characteristics of the duty of fair representation circumscribed above and measures against its backdrop the requirements of a plan fiduciary, it becomes profoundly clear the two duties are functionally close.

Finally, expanding the concept expressed by Chief Judge Haynesworth in *Harrison* that the duty of fair representation is similar to a civil right action where the petitioner's rights are as important and often as difficult to enforce without the existence of punitive damages in aggravated cases, petitioner respectfully commends the Court's attention to its holding in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1970).

The Honorable Justice Brennan stated for the majority as follows:

> "Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequence of its violation. But 'it is well-settled that where legal rights have been invaded and a federal statutue provides for a general right to sue for such invasion, Federal courts may use any available remedy to make good the wrong done.' *Bell v. Hood,* 327 U.S. 684."

In Justice Harlan's concurring decision, he stated:

> "Where federally-protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies to grant the necessary relief . . .

[8] Id. at 563, 564.

> Thus in suits for damages based on violations of Federal statutes lacking an express authorization of a damage remedy, this court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964)."

Equally as instructive as the statement of legal principle that this Court has a capability recognized under the federal law to make available damage remedies for breaches of ERISA is Justice Brennan's rejection of the defendants' contention that Congress did not expressly provide for money damages. The court held, that since there was no explicit congressional declaration that a person aggrieved by a tortfeasor violating the Fourth Amendment "may *not* recover money damages . . . we hold that petitioner is entitled to recover money damages for *any injuries* he has suffered as a result of the violation . . ." (emphasis added). *Id.* at 397.

In the instant case, not only has Congress in its Legislative charge specifically authorized "broad remedies" as redress to an aggrieved Plan Beneficiary, but they have also expressly mandated the availability of "the full-range of legal and equitable remedies." The specific language of the within statute is sufficiently more supportive of an award of money damages than any noted by this Court in *Bivens.*

The onus is not upon Pfister to establish express statutory authorization for the recovery of compensatory and punitive damages, but rather the burden in accordance with Justice Brennan's decision in *Bivens* is upon Respondent to show that there is an explicit congressional prohibition that persons injured and aggrieved by willful and wanton acts undertaken by a fiduciary in derogation of his federal fiduciary duties is **not** to recover money damages. Respondents have not, and cannot, carry any such burden.

Conscientious review of all of the Legislative History of ERISA authorizing the full-range of legal and equitable remedies together with its admonition that ERISA emulate and incorporate the substantive features of national labor law contained in 29 U.S.C. Section 185, and the various judicial determinations at this Court level all strongly indicate that a Plan beneficiary, such as the Petitioner, is unquestionably entitled to pursue an award of compensatory and punitive damages, when he is the subject of conduct, outrageous and recklessly indifferent to his well-being and rights, as in the instant case.[9]

Of equal force in compelling this Court to vacate the subject orders holding that ERISA does not support an award of compensatory and punitive damages is the recognition that this is the only judicial remedy which is realistically appropriate to vindicate the personal interests protected by the ERISA statute.

Without meaningful sanctions to insure the substantive protections of ERISA, there will be no substantive protection. This Court should not be beguiled by Respondents who perceive no accountability under Federal law to their beneficiaries. Accordingly, immediate action is required by this Court

[9] A plan fiduciary must discharge his duties with respect to a plan solely in the interest of the plan participant and beneficiary. In discharging his duties, the Fiduciary must act "for the exclusive purpose of providing benefits to beneficiaries and defraying the reasonable expenses of administering the plan." He must conduct the affairs of the plan "with the care, skill, prudence and deligence under the circumstances then prevailing that a prudent man acting in like circumstances, capacity, and familiar with such matter would use in the conduct of an enterprise of like character and like aims." Further, he is required to diversify investments to minimize losses unless it is unwise to do so. Lastly, he must act "in accordance with the documents and instruments governing the plan to the extent that those documents are consistent with the requirements of the law." (Am. Jur. New Topic Service: Pension Reform Act).

to clarify the remedies available to a beneficiary injured by ruthless institutional machoism and fiduciary misconduct, lest there be a flourish of comparable judicial ambiguities.

II.

A COURT OF APPEALS CANNOT SANCTION DISTRICT COURT'S ERISA ABERRATIONS WHICH PLACE PETITIONER IN A WORSE POSITION AFTER ERISA'S ENACTMENT THAN HE WAS AT COMMON LAW, BEFORE ITS ADOPTION.

The practical effect of the District Court order of December 21, 1978 (Appendix A) and July 2, 1979 (Appendix E) if unchanged, is that ERISA is not an instrument to encourage protection of plan participant rights, but rather a mantle of immunity under which plan sponsors and fiduciaries can galvanize themselves from damage remedies to which they are otherwise susceptible in the absence of ERISA.

The District Court's position can be summarize as follows:

ERISA does not provide any compensatory or punitive damages even for egregious fiduciary breaches and is the exclusive remedy available to an aggrieved plan participant, having preempted all common tort laws, and done so at a minimal threshold of liability. Therefore, if a plan participant prior to ERISA were able to sue out a valid cause of action for emotional and mental distress or breach of the implied duty to deal in good faith or fraud under common law tort, the District Court contends ERISA preempts his right to do so, now, as well as his right to recover damages for said tort even though he sustains injury as a consequence of a breach of a federal duty. Neither Legislative History nor congressional intention support this fragile conclusion. The purpose of ERISA is to *strengthen* and *fortify* fiduciary conduct, not diminish and obscure it.

It is difficult to conceive how a District Court such as Respondent Edenfield, who being adequately assured by Petitioner that the common law counts recited by Petitioner are sufficient for the imposition of compensatory and punitive award for injuries Pfister sustained at the hands of Respondent DELTA, can hold the Respondent DELTA to a lesser standard under the express statutory provisions of ERISA. (29 USC § 1104, et seq.)

Without detailing the precise prima facie requirements of the torts recited by the Petitioner, it is enough to note that each of the counts stated by the Petitioner does sound a valid cause of action against Respondent DELTA at common law and, as such, would hold Respondent amenable in both compensatory and punitive damages. Common law fraud and misrepresentation, the intentional conflict of emotional distress, tortious interference with a fiduciary relationship and breach of the implied covenant of good faith and fair dealing, are all recognized torts sufficient in themselves to authorize compensatory and punitive damages. Recently on March 1, 1980 this Court in *Mutual of Omaha v. Egan* No. 79-1073 refused to grant certiorari and overturn the California Supreme Court's decision holding that a disability insurer who in bad faith terminates a disability recipient's benefits, as in the instant case, is subject to both compensatory and punitive damages for breach of the implied covenant of good faith and fair dealing.

The California Supreme Court observed that:

"As one commentary has noted, 'The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . **[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The**

obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust." (Goodman & Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court* (1974) 62 Cal.L.Rev. 309, 345-347.) **Furthermore, the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship.** (Hirsch et al., *Strict Liability: A Response to the Gruenberg-Silberg Conflict Regarding Insurance Litigation Awards* (1975) 7 SW U.L.Rev. 310, 326; Comment, *Egan v. Mutual of Omaha Insurance Co.: The Expanding Use of Punitive Damages in Breach of Insurance Contract Actions* (1978) 15 San Diego L.Rev. 287, 298-301; Note, *Contracting for Punitive Damages: Fletcher v. Western National Life Insurance Company* (1971) 4 Loyola L.A. L.Rev. 208, 219-224.)

Egan manifests vividly the impropriety of the Respondent's District Court's order the focus of this petition. If in the absence of ERISA, Respondent DELTA would be liable to Petitioner for compensatory and punitive damages, in accordance with Egan, how can a district court read ERISA in such a way as to eliminate that accountability. This Court can not abide such judicial chicanery.

Respondent Edenfield would have this Court believe that Respondent DELTA's assumption of a statutory fiduciary duty would result in a thinner accountability than that imposed by the common law.

Petitioner skepticism is fueled by a District Court's order which has rendered Pfister an inferior "legal person" than he was prior to the creation of a statute designed to create standards of conduct so that his exclusive best interests are mindfully served and his legal dignity enhanced. Petitioner needs no such judicial amicus.

In their present format the orders of the District Court having received Respondent Circuit Court's blessing are an affront to this Court and to our sacred profession.

III.

THE RELIEF SOUGHT HEREIN IS UNAVAILABLE IN ANY COURT, OTHER THAN THIS COURT, AND THE COURT OF APPEALS' REFUSAL TO EXERCISE ITS APPELLATE OR MANDAMUS JURISDICTION TO REVIEW THE SUBJECT ORDERS WHICH ARE FUNDAMENTAL TO FURTHER CONDUCT OF THE LAWSUIT IS IRREPARABLY INJURING THE FIDUCIARY RIGHT SOUGHT VINDICATED BY THE PETITIONER.

This Court can assure itself under *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, that there is sufficient legal footing for it to review now the substantial legal questions presented herein growing from an unheeded congressional command to the Respondent Courts to fashion a federal fiduciary standard and to ensure that standard with all appropriate remedies.

This Court in *United States v. General Motors Corp.*, 323 U.S. 373, and *Land v. Dollar*, 330 U.S. 731, reviewed a final court's finding in a case not yet tried because the ruling was "*fundamental to the further conduct of the case.*"

The factual similarities between *Gillespie* and the within case are striking as this Court stated in *Gillespie* "in *deciding* the *question* of *finality* the most *important* competing consideration

are the *inconvenience* and costs of piecemeal review on the one hand and danger of denying justice by delay on the other." . . . *And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in* having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them, cf. *Dickinson v. Petroleum Conversion Corp., supra,* certainly is ample reason to view their claims as severable in deciding the issue of finality.

If this Court does not now act to review the subject orders on the merits, not only will the fiduciary protection sought to be vindicated by Pfister be irreparably harmed, but he will be compelled to proceed with litigation whose legal predicate is fatally flawed. The harshness of the District Court's derelictions has been further amplified by Respondent Court of Appeals' adamant refusal to extend judicial care to Pfister citing judicial orderliness as an excuse. Petitioner, commends at last, what should properly—be acknowledged at first—the admonition of the Honorable Justice Learned Hand "Liberty lies in the hearts of men and women; when it dies there, no Constitution, no Law can save it."

CONCLUSION

For all the foregoing reasons, Petitioner prays this Court issue writs of prohibition, mandamus, and injunction, or one or more said writs, as this Court deems appropriate, directed to Newell Edenfield, District Judge, and to Robert Hall, District Judge, Respondents herein, restraining said Respondents from enforcing said orders of December 21, 1978 and July 2, 1979 and requiring Respondents to vacate said orders forthwith; and that further appropriate writs be directed to the Respondent Court of Appeal to review and vacate the orders rendered by it on July 3, 1979, November 5, 1979, November 13, 1979 and December 5, 1979, and Petitioner further prays that a common law writ of certiorari issue from this Court to the named Respondent Courts and that the issues presented herein be placed upon the docket of this Court for full briefing, argument and disposition on the merits with all deliberate speed, and that a stay of all proceedings preserving the status quo of the litigation be granted, until the issues presented are disposed of on the merits by this Court. Petitioner further prays for the costs of this document, advanced by counsel because of petitioner's poverty and for attorney fees and other costs incurred to vindicate his cause up to and before this Court authorized by statute, and for such other and further relief as this Court may deem just and equitable.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Eugene J. Carella, counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Common Law Writ of Certiorari and Writ of Mandamus and/or Prohibition and/or Injunction to District Court and Court of Appeals for the Fifth Circuit named herein is presented in good faith to fully protect the cause and rights of Petitioner and is not filed for purpose of delay.

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